

BROKEN H RANCH CO.

IBLA 78-29 Decided March 21, 1978

Appeal from decision of Wyoming State Office, Bureau of Land Management, rejecting application W-56852 for a right-of-way for a water pipeline across certain Federal lands in Park County, Wyoming.

Affirmed.

1. Evidence: Burden of Proof—Federal Land Policy and Management Act of 1976:
Rights-of-Way—Rights-of-Way: Federal Land Policy and Management Act of 1976

Section 503 of the Federal Land Policy and Management Act of 1976 gives the Secretary discretionary authority with respect to issuance of rights-of-way. It would not be in public interest to grant appellant right-of-way because of inadequate water flow in Shoshone River and because of potential interference with planning for a modification of Buffalo Bill Dam. A decision by BLM, made in exercise of its discretion, to reject a water pipeline right-of-way application will be affirmed when the record shows the decision to be a reasoned analysis of factors involved made in due regard for public interest, and no sufficient reason to disturb decision is shown.

APPEARANCES: C. Edward Webster II, Esq., Housel and Webster, Cody, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Broken H Ranch Co. has appealed from a September 13, 1977, decision of the Wyoming State Office, Bureau of Land Management (BLM), rejecting application W-56852 for a right-of-way for a water pipeline

across certain Federal lands in Park County, Wyoming. Appellant intended to divert water from the North Fork of the Shoshone River for domestic use related to proposed housing and farming development in the area. The route for the proposed pipeline would in part cross several reclamation withdrawals within the Shoshone Reclamation Project, and in part cross other Federal lands.

The BLM stated two bases for its denial of the application in issue. The first was a construction of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2743, 43 U.S.C.A. § 1701 *et seq.* (Supp. 1977), to the effect that the BLM did not have the authority essential for its approval of the application. The second basis was the discretionary choice of the BLM not to exercise its right-of-way authority because of certain environmental conditions and certain pertinent engineering plans, as related *infra*. Appellant argues that the BLM's construction of FLPMA is not valid.

The record contains two letters giving the rationale for the application denial in issue. On January 13, 1977, the Acting Regional Director, Upper Missouri Region, Bureau of Reclamation, wrote to Mr. E. O. Sowerwine, Jr. of Broken H Ranch Company:

The following information is in reply to your letter of December 26, 1976, concerning further development adjacent to Buffalo Bill Reservoir.

At the present time, our plans are to continue to dedicate the Bureau of Reclamation lands near the reservoir to recreation purposes. We cannot give you approval to include the name of Bureau of Reclamation or any Federal lands in your water right negotiations with the State of Wyoming.

A water right of present-day priority on the Shoshone River would probably not provide sufficient water for an adequate irrigation supply. During the July-August period when water is needed most, the available natural flow of the river is over appropriated. This is clearly evident from the need for storage releases from Buffalo Bill Reservoir.

Our Commissioner's Office in Washington, D.C., is currently preparing a report on the potential modification of Buffalo Bill Dam. These modifications could include, among other things, raising the dam 25 feet, enlarging the reservoir and installing dikes to impound water over dust-producing areas. Because these modifications could affect your plans, our consideration of your proposal should be deferred until the decision is made whether to recommend modification of Buffalo Bill Dam.

If the modification is recommended and subsequently authorized, your proposal could be considered during advance planning. If the decision is made not to recommend authorization of the modification, your proposal could be considered in new studies approved and funded by the Congress. We will add your name to our mailing list to receive a copy of the report on modification of Buffalo Bill Dam when it is ready for distribution.

The Director of the same office further informed appellant by letter of July 26, 1977, that:

We appreciate the additional information you provided concerning the proposal. However, after careful consideration of the request, we feel obligated to disapprove it primarily on the basis of the impacts which would be incurred by construction, operation, and maintenance of the facility across public use areas at Buffalo Bill Reservoir. In addition, there would not be a dependable water supply for the development. Our experience in 1977 has proven the natural flow is inadequate for existing developments. Moreover, there is no excess water available from Buffalo Bill Reservoir storage. Any project which would further deplete existing water supplies would be strongly opposed by the present water users and the Bureau of Reclamation.

In considering appellant's request, the BLM sought the advice of the Bureau of Reclamation. In a May 31, 1977, memorandum, Reclamation said: "[W]e request that the application be rejected pursuant to the concerns expressed in the enclosed letter of January 13, 1977, to Mr. Sowerwine."

[1] It is provided in section 501(a) of FLPMA that: "The Secretary, with respect to the public lands * * * [is] authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for * * * reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water * * *." 43 U.S.C.A. § 1761 (Supp. 1977). Section 501(a) gives the Secretary discretionary authority in respect of the issuance of rights-of-way. See Edwin L. Rumpf, Jr., 31 IBLA 367 (1977). We are persuaded by the points raised in the letters from the Bureau of Reclamation that it would not be in the public interest to grant appellant this right-of-way because of inadequate water flow in the Shoshone River and because of potential interference with planning for a modification of the Buffalo Bill Dam. In Jack M. Vaughan, 25 IBLA 303 (1976), we held:

Approval of a domestic water pipeline right-of-way under the Act of February 15, 1901, is within the discretion of the Secretary of the Interior. * * * A decision by BLM, made in the exercise of this discretion, to reject such an application will be affirmed by the Board when the record shows the decision to be a reasoned analysis of the factors involved made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Such a holding is properly analogized to the facts and law of this case, as stated above. Thus, we hold that the BLM's rejection of appellant's application was proper.

Because of the disposition of this case on the basis stated above, we find it unnecessary to consider the legal issue raised in respect of the BLM's authority to grant the right-of-way herein disputed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur.

Newton Frishberg
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

